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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/025,896

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Filing Date: February 18, 1998

JUN 03 2005

Appellant(s): LONGSTRETH, BILLIE JEAN

Group 3700

Billie Jean Longstreth
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed January 1, 2005.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The rejection of claim 7 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) *ClaimsAppealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

4,858,317	SEIB et al	08-1989
1,525,514	ROTHJE	02-1925
3,456,346	SNYDER	07-1969
893,425	BELL	07-1908
3,004,340	COLLINS	10-1961

(10) *Grounds of Rejection*

Claim 7 stands rejected under 35 U.S.C. 102(b) as being anticipated by Seib et al.

Seib et al discloses a stoma flange cutter comprising all the elements claimed including, inter alia, a circular top (e.g. 38, 40); a circular bottom (e.g. at 42); a cylindrical body wall (36); a permanently affixed cap (18); cutting edge (42); and a removable protective cover (20).

Regarding the work being "cabbage", this has not been given significant patentable weight, since it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

Regarding the manner in which the cutting and chopping means is formed, this has not been given significant patentable weight, since in an apparatus invention, how a structure is formed is not germane to the structure itself.

Claim 7 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Rothje in view of Snyder.

Rothje discloses the invention substantially as claimed including, *inter alia*, a cylindrical body (1); a closed top and handgrip (e.g. at 6); an open bottom (at 2 in the Figures); and a cutting edge (2). See whole patent. However, Rothje lacks a cover for the cutting edge. In that regard, Snyder teaches a cylindrical shaped cutter having a protective cover (40) for the inherent purpose of protecting the user from potential harm via the cutting edge (30). Figs. 1-8, c. 2, ll. 35-38. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the device of Rothje with the cover as taught by Snyder in order to prevent potential harm to the user from the cutting edge.

Claim 7 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Rothje in view of Seib et al.

Rothje discloses the invention substantially as claimed including, *inter alia*, a cylindrical body (1); a closed top and handgrip (e.g. at 6); an open bottom (at 2 in the Figures); and a cutting edge (2). See whole patent. However, Rothje lacks a cover for the cutting edge. In that regard, Seib et al teaches a cutter having a protective cover (20) for the inherent purpose of protecting the user from potential harm via the cutting edge (42) as well as for storage purposes. See c. 3, ll. 4-18. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the device of

Rothje with the cover as taught by Seib et al in order to prevent potential harm to the user from the cutting edge and to facilitate storage of the device.

Claim 7 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Bell in view of Collins and Snyder.

Bell discloses the invention substantially as claimed including, *inter alia*, a cylindrical body (1); a closed top and handgrip (e.g. at 4); and an open bottom (below 5 in Fig. 3). See whole patent. However, it appears that Bell lacks (A) a sharpened cutting edge and (B) a cover.

Regarding (A), although it appears that Bell lacks a sharpened edge, Collins teaches a kitchen utensil having a cylindrical body (10) and a sharpened cutting edge (14) which allows for an easier operation of cutting slicing, chopping, mixing and blending of foods. Figs. 1-3, c. 1, ll. 7-15 and c. 2, ll. 38-41. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the device of Bell with the sharpened cutting edge as taught by Collins in order to facilitate easier chopping of material.

Regarding (B), the modified device of Bell lacks a cover for the cutting edge. However, Snyder teaches a cylindrical shaped cutter having a protective cover (40) for the inherent purpose of protecting the user from potential via the cutting edge (30). Figs. 1-8, c. 2, ll. 35-38. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the modified device of Bell with the cover as taught by Snyder in order to prevent potential harm to the user from the cutting edge.

Claim 7 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Bell in view of Collins and Seib et al.

Bell discloses the invention substantially as claimed including, *inter alia*, a cylindrical body (1); a closed top and handgrip (e.g. at 4); and an open bottom (below 5 in Fig. 3). See whole patent. However, it appears that Bell lacks (A) a sharpened cutting edge and (B) a cover.

Regarding (A), although it appears that Bell lacks a sharpened edge, Collins teaches a kitchen utensil having a cylindrical body (10) and a sharpened cutting edge (14) which allows for an easier operation of cutting slicing, chopping, mixing and blending of foods. Figs. 1-3, c. 1, ll. 7-15 and c. 2, ll. 38-41. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the device of Bell with the sharpened cutting edge as taught by Collins in order to facilitate easier chopping of material.

Regarding (B), the modified device of Bell lacks a cover for the cutting edge. However, Seib et al teaches a cutter having a protective cover (20) for the inherent purpose of protecting the user from potential harm via the cutting edge (42) as well as for storage purposes. See c. 3, ll. 4-18. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the modified device of Bell with the cover as taught by Seib et al in order to prevent potential harm to the user from the cutting edge and to facilitate storage of the device.

(11) Response to Argument

Claim Rejection Under 35 USC § 102

In response to Appellant's basic argument that Seib et al does not anticipate the claimed invention because Seib et al does not function in a similar manner to

Appellant's invention nor does Seib et al, allegedly, not include some of the claimed features,¹ these arguments are traversed.

First, Appellant's main point of contention is that two devices comprising the same elements may still be physically and mechanically different (in function and form) and thus patentably distinct.² This is traversed to the extent that it still does not overcome the fact that Seib et al anticipates the structural limitations. Whether or not Seib et al has a different set up or intended use has no patentable weight in terms of the claimed structure, i.e. the manner in which the claimed invention is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987). It is understood that there are differences between the invention and the cutter of Seib et al, i.e. a side by side comparison of the *disclosed* invention and the device of Seib et al reveals structural differences between the two, some of which being touched on by the Appellant. Another difference is that the claimed invention is intended for cabbage whereas the device of Seib et al is intended for cutting a stoma flange. However, it is the claim that defines the metes and bounds of the invention. The claim at issue calls for three main features: (1) a hollow cylindrical body with a closed top and an open bottom with the bottom having a cutting edge; (2) a handgrip; and (3) a removal protective cover. In that regard, Seib et al teaches a hollow cylindrical body (e.g. at 36) having a closed top (between 38, 40 in Figs. 2 and 4) and an open bottom (e.g. at 42 in Fig. 2) with the bottom having a cutting edge (42); a cylindrical body wall (36); a permanently

¹ Brief, pp. 4-5.

² Brief, p. 4, ll. 5-7.

affixed handgrip (at 18); and a removable protective cover (20). Figs. 2 and 4. Even the Appellant appears to acknowledge that Seib et al includes all the claimed limitations as noted by the Appellant's arguments. See e.g. Brief, p. 5, ll. 18-19.

To analyze the claim more in depth with respect to certain features that may raise issues, the claim calls for "a handgrip that covers the closed top and extends slightly over onto the wall of the cabbage cutter, and provides additional strength". Claim 7, ll. 5-8. As seen in Appellant's drawings, the claimed handgrip is referenced by reference numeral (4) at Figs. 2 and 4. It should be noted that the claimed feature does not set forth a specific size, shape, and/or material of the handgrip nor in which direction the handgrip must extend - up, down or side to side. It just needs to extend slightly over the wall and provide additional strength. With respect to the former, the depending portions (e.g. at 32, 34 in the Figures) of the handgrip (18) in Seib et al reads on the claimed handgrip. With respect to the latter, it is the Examiner's opinion that the additional strength provision is an inherent result of having the handgrip covering the top of the cylindrical body. Since Seib et al's handgrip covers the top of the cylindrical body, Seib et al also anticipates this limitation. The claim also calls for "a removable protective cover, contiguous with the cutting and chopping edge..." to shield from injury and storage purposes. Claim 7, ll. 11-16. It should be noted that the claim does not specify size, shape, and/or material of the protective nor does the claim limit the protective cover so that it cannot have any holes. The protective cover merely needs to be removable, i.e. capable of being placed over the cutting edge, and contiguous with the cutting edge. The term "contiguous" is synonymous with "adjacent". In that regard, Seib et al's protective cover (20) reads on this limitation. Since a protective cover by

definition performs the functional recitations of shielding and storing with minimal fuss with respect to the cutting edge of the device, Seib et al also anticipates this limitation.

Second, the Appellant argues that there is a patentably distinct difference between the two separable sections of Seib et al's device compared to that of Appellant's claimed invention, but it is not clear how. Appellant's claimed invention may be construed as comprising three parts (or sections) (1) a hollow cylindrical body with a closed end and an open end; (2) a top cover; and (3) a removal protective cover. In that regard and noted in the outstanding rejection, Seib et al includes and anticipates all the above mentioned claimed parts or sections. Moreover, in line with the Examiner's rebuttal *supra* about intended use, the fact that Seib et al has a cutter that press fits into the feature reading on the protective cover does not detract from anticipating this claimed feature because the claim is not so limiting as to prevent the Examiner's interpretation. In other words, the claim does not require that the protective cover to be completely without holes of any kind. The claim states that the protective cover is "contiguous with the cutting and chopping edge",³ and the term "contiguous" is synonymous with "adjacent" which from Fig. 2 of Seib et al clearly shows that the cover (20) is in fact "adjacent" the cutting edge (42). Therefore, the mere fact that Seib et al utilizes the cover with a hole to facilitate cutting of stoma flanges does not distinguish from the claim even though Appellant's cover is simply intended for what the limitation implies, mainly to only cover the cutting edge. Furthermore, it is clear from the teachings of Seib et al that the protective cover performs a dual function of facilitating the cut as well as covering the cutting edge. It is important to emphasize that dual

functionality is not a detriment to Seib et al's protective cover in anticipating this claimed limitation. Another point of Appellant's contention may be with respect to the claimed handgrip extending slightly over onto the wall of the cylinder in which case, it appears that Seib et al includes this feature at (32) in Figs. 2 and 4. A further contention of Appellant is with respect to the package cover of Seib et al's device. However, that has no bearing on the claim at bar because on the one hand, that has not been identified by the Examiner as reading on the claimed protective cover and on the other hand, it is irrelevant whether other prior art devices are more complicated or has more features than that of Appellant's invention since the claim is broad enough to encompass additional features to those claimed. In other words, if the prior art shows each and every feature claimed with the exception of whatever additional features that the prior art may disclose, the prior art still anticipates or reads on the claimed features.

Third, the Appellant basically argues that Seib et al is not capable of cutting cabbage, which the Examiner respectfully traverse. It is the Examiner's opinion that although Seib et al's invention may not be intended to be used on food products, the cutter of Seib et al is fully capable of cutting cabbage in that cabbage (food) is not so materially different from a plastic type material (stoma flange) that precludes this capability. For example, if the top section of Seib et al, the section with the cutter, is used alone to cut into cabbage, then one of ordinary skill in the art would surmise that Seib et al's top section would be able to so perform because Seib et al's top section would be robust enough to withstand whatever forces may be required to cut cabbage.

³ Claim 7, ll. 11-13.

As a final note, while the utility and elegant simplicity of Appellant's invention in design and function are appreciated (as set forth by the Appellant), the fact that Seib et al anticipates the claimed structural limitations precludes patentability of Appellant's claimed invention.

Claim Rejection Under 35 USC § 103

Sections (a)-(e)

In response to Appellant's basic arguments against the references Rothje, Snyder, Seib et al, Collins, and Bell individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The arguments compare the differences in each individual reference to that of the claimed and oftentimes the disclosed invention. It should be noted that these references were not applied to reject the claim under 35 USC § 102, i.e. anticipation. They were applied under 35 USC § 103 either as a starting reference or a teaching reference for whatever the features the starting reference may lack. Moreover, the differences between the applied secondary references - Snyder, Seib et al, and Collins - and the Appellant's invention are not germane to the claim at bar, since these references have been applied for their teachings of either the protective cover or the cutting edge. All the other details of these references need not be considered outside of the obviousness teaching as long as they are analogous and/or reasonably pertinent to the claim. The Examiner has explained this concept to the Appellant in the Final Office Action, Paper No. 30, as well as in previous and subsequent telephone

conversations. Due to the fact that these arguments only address the differences between the applied prior art and the invention claimed or disclosed as opposed to the obviousness of the combinations, these arguments must fail.

For completeness, the Examiner will address Appellant's arguments with respect to the primary references Rothje and Bell.

Primary References

In response to Appellant's basic argument that Rothje is not a *prima facie* case of obviousness because Rothje includes additional features, e.g. rotary cutters, than those of Appellant's invention,⁴ this argument is traversed. Again, it is emphasized that it is irrelevant whether the prior art devices are more complicated or has more features than that of Appellant's invention since the claim is broad enough to encompass additional features to those claimed. In other words, if the prior art shows each and every feature claimed with the exception of whatever additional features that the prior art may disclose, the prior art still anticipates or reads on the claimed features. To further emphasize this point about broadness of the claim, the claim does not state that the hollow body must be empty. Thus, Appellant's point does not require consideration for patentability. It is noted that Rothje's device is a food cutter and therefore fully capable of cutting cabbage. It is further noted that in Rothje, the features indicated by reference numerals (6 and 2') read on the claimed handgrip. In sum, Rothje includes all the claimed limitations except for the protective cover which the secondary references Snyder and Seib et al renders obvious.

In response to Appellant's basic argument that Bell is not a *prima facie* case of obviousness because Bell allegedly lacks or includes certain features,⁵ this argument is traversed. First, it is noted that Bell's inclusion of a corrugation is not germane to the claim at bar because nothing in the claim bars the existence or non-existence of a corrugation, e.g. the claim does not set forth that the cylindrical body must be smooth. Second, Bell includes a closed top (at 2) and a handgrip (4) that covers the top contrary to Appellant's argument. Third, Bell's device is a vegetable cutter which includes the capability of cutting cabbage. The fact that Appellant contends that Appellant's invention is exclusive to cutting cabbage does not overcome the *prima facie* case of obviousness of Bell as a primary reference. Moreover, it is obvious to the ordinary artisan that while Appellant's invention is designed specifically for cabbage, Appellant's invention is also capable of cutting other vegetables and materials. In sum, Bell includes all the claimed limitations except for the cutting edge and the protective cover, the former rendered obvious by the teachings of Collins and the latter rendered obvious by the teachings of Snyder and Seib et al.

Assertion of Long Felt Need

In response to Appellant's arguments of long felt need,⁶ this argument is traversed. First, the Appellant has not submitted any affidavit in support of this allegation. Second, the Appellant has not proffered any objective evidence that an art recognized problem existed in the art for a long period of time without resolution.

⁴ Brief, (b), pp. 6-7.

⁵ Brief, (e), p. 9.

Third, if the alleged long felt need is for a device that cuts cabbage well, then the existence of food processors shows that this need has been satisfied by others which renders this point moot. Moreover, the teachings of Bell appear to refute this allegation since Bell's invention cuts vegetables, inherently includes cabbage, reasonably well, especially when modified at least in part with a sharpened cutting edge as taught by Collins. Fourth, the alleged failure to solve a long felt need may be due to factors such as lack of interest or lack of appreciation of an invention's potential or marketability rather than technical know how.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



CHARLES GOODMAN
PRIMARY EXAMINER

CG
May 2, 2005

Conferees
Allan Shoap, SPE AU 3724

Gregory Vidovich, SPE AU 3711

BILLIE JEAN LONGSTRETH
406 RISING HILL DRIVE
FAIRBORN, OH 45324

⁶ Brief, p. 9.